Phiri Mailesi (Zambian) v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05–311–11 OF 2011
APANDI ALI, LINTON ALBERT AND HAMID SULTAN JJCA
16 JULY 2013

Criminal Procedure — Appeal — Appeal against conviction and sentence — Drug offence — Accused sentenced to death — Whether accused had knowledge — Whether judge directed his mind to test in Mat v Public Prosecutor — Dangerous Drugs Act 1952 s 37(d)

The appellant was arrested at Bayan Lepas Airport, Penang with a bag containing drugs. The appellant had flown from Maputo, Mozambique to Johannesburg, South Africa and from Johannesburg to Hong Kong and from Hong Kong to Penang, Malaysia and the luggage tag ('exh P17') attached to the bag ('P5') bore reference numbers of the flights from Johannesburg to Hong Kong and to Malaysia as seen in the flight ticket. The appellant's name was also found on P17. When the aircraft finally landed at the airport, the appellant eventually retrieved P5 and carried it to the scanning machine where the drugs were detected. The facts as narrated by the prosecution showed that the accused had presumed possession of the bag and therefore, the drugs hidden inside both side linings of the bag. Padlock keys to the padlock of P5 were found in her handbag and it meant that the accused was having custody or control of P5 and its contents including the drugs. The High Court found that the appellant had possession of the bag and the incriminating drugs by virtue of s 37(d) of the Dangerous Drugs Act 1952 ('DDA'). The appellant was convicted for the charge and sentenced to death pursuant to s 39B(1)(a) of the DDA. In the present appeal against her conviction and sentence, the appellant raised only one issue as to knowledge and asserted that she had no knowledge and complained that the judge did not direct his mind to the test in *Mat v Public Prosecutor* [1963] 1 MLJ 263 ('Mat v Public Prosecutor').

Held, dismissing the appeal:

(1) *Mat v Public Prosecutor* test is not a test per se within our contemporary jurisprudence in criminal law but a simplistic guide line to magistrates to explain how to convict or acquit an accused in relation to beyond reasonable doubt test at the end of the defence case. Subsequent to *Mat v Public Prosecutor*, the law had developed in leap and bounds to give greater protection to the accused and a more onerous task to the prosecution to establish its case beyond reasonable doubt at the prosecution stage as well as the defence stage by introducing the maximum evaluation test (see para 6).

(2) The hallmark of proper judicial assessment and consideration in any judgment in criminal case would be reflected where the judge had considered the defence story in the right perspective taking into consideration where applicable the cases and the statutory defence under s 53 of the Evidence Act 1950 (see para 8).

(3) It is well-settled that it is in the hands of triers of facts to assess the quality of evidence and to determine whether the evidence on record justifies a conviction as well as sentence. There was sufficient material to support a charge for trafficking and the view taken by the trial court on the relevant issues was a reasonable view of the evidence on record and the court had followed *Mohamad Radhi bin Yaakob v Public Prosecutor's* direction and rightly applied the maximum evaluation and beyond reasonable test (see para 12).

[Bahasa Malaysia summary

Perayu ditangkap di Lapangan Terbang Bayan Lepas, Pulau Pinang dengan beg yang mengandungi dadah. Perayu telah terbang dari Maputo, Mozambique ke Johannesburg, Afrika Selatan dan dari Johannesburg ke Hong Kong dan dari Hong Kong ke Pulau Pinang, Malaysia dan teg bagasi ('eksh P17') yang terikat di beg ('P5') menunjukkan rujukan nombor penerbangan-penerbangan dari Johannesburg ke Hong Kong dan ke Malaysia seperti yang dapat dilihat di tiket penerbangan. Nama perayu juga didapati di atas P17. Apabila kapal terbang akhirnya mendarat di lapangan terbang, perayu akhirnya mengambil P5 dan membawanya ke mesin pengimbas di mana dadah tersebut dikesan. Fakta seperti yang dinyatakan oleh pihak pendakwaan menunjukkan bahawa tertuduh telah dianggap memiliki beg dan oleh itu, dadah yang disembunyikan dalam bahagian kedua-dua belah lapisan beg. Kunci-kunci mangga kepada mangga P5 diperolehi daripada beg tangannya dan ini bermaksud bahawa tertuduh mempunyai jagaan atau kawalan terhadap P5 dan kandungannya termasuk dadah. Mahkamah Tinggi mendapati bahawa perayu mempunyai milikan terhadap beg dan dadah tersebut berdasarkan s 37(d) Akta Dadah Berbahaya 1952 ('ADB'). Perayu disabitkan untuk tuduhan dan dihukum mati berikutan s 39B(1)(a) ADB. Dalam rayuan ini terhadap sabitan dan hukuman, perayu membangkitkan hanya satu isu terhadap pengetahuan dan menegaskan bahawa dia tidak mempunyai pengetahuan dan mengadu bahawa hakim tersebut tidak mengarahkan mindanya kepada ujian dalam kes *Mat v Public Prosecutor* [1963] 1 MLJ 263 ('Mat v Public Prosecutor').

Diputuskan, menolak rayuan:

(1) Ujian dalam kes *Mat v Public Prosecutor* bukan ujian itu sendiri dalam jurisprudens semasa dalam undang-undang jenayah tetapi garis panduan mudah kepada majistret untuk menjelaskan bagaimana untuk menyabit atau melepaskan tertuduh berkaitan ujian melampaui keraguan munasabah di akhir ke pembelaan. Selepas kes *Mat v Public Prosecutor*,

undang-undang telah berkembang dengan pesatnya untuk memberi perlindungan yang besar kepada tertuduh dan tugas yang lebih berat kepada pihak pendakwaan untuk membuktikan kesnya melampaui keraguan munasabah pada peringkat pendakwaan dan juga pada peringkat pembelaan dengan memperkenalkan ujian penilaian maksima (lihat perenggan 6).

(2) Ciri betul penilaian kehakiman dan pertimbangan dalam apa-apa penghakiman dalam kes jenayah akan dapat dilihat di mana hakim telah mempertimbangkan kes pembelaan dalam perspektif yang betul dengan mengambil kira di mana kes-kes terpakai dan pembelaan statutori di bawah s 53 Akta Keterangan 1950 (lihat perenggan 8).

(3) Adalah nyata bahawa ia adalah atas pembicara fakta untuk menilai kualiti keterangan dan untuk menentukan sama ada keterangan dalam rekod menjustifikasikan sabitan dan juga hukuman. Terdapat material yang mencukupi untuk menyokong tuduhan mengedar dadah dan pandangan yang diambil oleh mahkamah perbicaraan atas is-isu relevan adalah pandangan munasabah terhadap keterangan dalam rekod dan mahkamah mengikuti arahan kes *Mohamad Radhi bin Yaakob v Public Prosecutor* dan menggunapakai dengan betul penilaian maksima dan ujian melampaui munasabah (lihat perenggan 12).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 216–222.

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Balachandran v PP [2005] 2 MLJ 301, FC (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65, CA (refd)
Mat v PP [1963] 1 MLJ 263; [1963] 1 LNS 82 (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169; [1991] 1 CLJ (Rep) 311, SC (folld)
Munuswamy Sundar Raj v PP [2013] 5 MLJ 48; [2013] 1 LNS 183, CA (refd)
PP v Mohd Aszzid Abdullah [2008] 1 MLJ 281, HC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393, FC
PP v Thenegaran a/l Murugan [2013] 3 MLJ 328, CA (refd)
Rozmi bin Yusof v PP [2013] 5 MLJ 66; [2013] 4 CLJ 384, CA (refd)
Sochima Okoye v PP [1995] 1 MLJ 538, CA (refd)
Tong Kam Yew & Anor v PP [2013] 4 MLJ 888; [2013] 3 AMR 248, CA (refd)
Woolmington v The Director of Public Prosecutions [1935] AC 462, HL (refd)
Zulkifli bin Md Rodzi v PP [2013] 3 MLJ 745; [2013] 4 CLJ 250, CA (refd)

Legislation referred to

Criminal Procedure Code s 51A
Dangerous Drugs Act 1952 ss 37(d), 39B(1)(a)
Evidence Act 1950 s 53

Appeal from: Suit No 45–34 of 2011 (High Court, Pulau Pinang)

Yagoo Subramaniam (Yagoo & Associates) for the appellant.
Mohamad Abazafree bin Mohd Abbas (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant's appeal against conviction and sentence of death pursuant to s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') came up for hearing on 23 April 2013 and on the same day we heard the appeal and dismissed the same. My learned brothers Mohamed Apandi bin Hj Ali JCA and Linton Albert JCA have approved the draft judgment. This is our judgment.

[2] The accused was charged under s 39B(1)(a) which reads as follows:

> Bahawa kamu pada 8 Disember 2010, lebih kurang jam 7.30 malam, di Balai Ketibaan Lapangan Terbang Antarabangsa Pulau Pinang, di dalam daerah Barat Daya, di dalam negeri Pulau Pinang telah didapati mengedar dadah berbahaya iaitu Methamphetamine, seberat 770.2 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39(B)(2) Akta yang sama.

The English translation of the charge will read as follows:

> That you on 8 December 2010, at about 7.30 p m at the Arrival Hall, Penang International Airport, in the Barat Daya district, in the state of Penang was found trafficking in dangerous drug Methamphetamine, weighing 770.2 grams, thereby committing an offence under section 39B(1)(a) of the Dangerous Drugs Act 1952 (DDA) punishable under section 39(B)(2) of the same Act.

[3] In the instant case the learned trial judge in his 31 page judgment had gone through the facts and law and we do not wish to repeat the same save where it is necessary.

[4] The appellant has raised eight grounds of appeal which almost overlaps with one another. One of the issues raised in the grounds is a complaint that the learned trial judge had misdirected himself relating to *Mat v Public Prosecutor* [1963] 1 MLJ 263; [1963] 1 LNS 82 test which has been advocated in many cases (see *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169;

[1991] 1 CLJ (Rep) 311). On the date of the trial the petition of appeal filed in Bahasa Malaysia, inter alia, reads as follows:

(1) Yang Arif Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila membuat satu keputusan yang bertentangan dengan fakta.

(2) Yang Arif Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila membuat *adverse inferen* terhadap tertuduh yang telah memudaratkan tertuduh.

(3) Yang Arif Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila gagal untuk mengambil kira pembelaan tertuduh mengikut prinsip *Mat v PP* yang jelas menunjukkan satu salah arah yang telah mengakibatkan satu 'miscarriage of justice'.

(4) Yang Arif Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila gagal mengambilkira inferen yang berpihak kepada tertuduh yang telah mengakibatkan satu 'miscarriage of justice'.

(5) Yang Arif Hakim Mahkamah Tinggi yang bijaksana telah mengambilkira perkara yang tidak relevan dalam membuat keputusan tersebut yang jelas telah melakukan satu 'miscarriage of justice' kepada tertuduh.

(6) Yang Arif Hakim Mahkamah Tinggi yang bijaksana telah gagal untuk mengambilkira tentang pecahan dalam rantaian eksibit yang mana jika diambilkira, tertuduh akan dilepaskan dan dibebaskan.

(7) Yang Arif Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang apabila memanggil tetuduh untuk membela diri secara salah dari segi undang-undang.

(8) Berpandukan kepada fakta-fakta di atas serta OKT adalah seorang penghidap HIV (tahap 4), pohon rayuan untuk dibenarkan dan keputusan Mahkamah Tinggi diketepikan.

If it is translated in English it will read as follows:

(1) The learned High Court Judge erred in law and fact in making a finding contradictory to facts.

(2) The learned High Court Judge erred in law by invoking adverse inference detrimental to the appellant.

(3) The learned High Court Judge erred in law in failing to consider the appellant's defence based on the principle of *Mat v PP* leading to a misdirection causing miscarriage of justice.

(4) The learned High Court Judge erred in law in failing to adopt the inference favourable to the appellant causing miscarriage of justice.

(5) The learned High Court Judge erred in law by taking into account irrelevant facts in making a decision which caused miscarriage of justice.

(6) The learned High Court Judge failed to take into account the break in the chain of evidence, which otherwise would lead to the appellant's acquittal and discharge.

(7) The learned High Court Judge erred in law by calling the appellant to enter his defence which was wrong in law.

(8) Based on the above facts and the fact that the appellant is suffering from HIV (stage 4), pray for the appeal be allowed and the decision of the High Court be set aside.

[5] Before us learned counsel for the appellant raised only one issue as to knowledge and asserted that the accused had no knowledge and complains that the judge did not direct his mind to the test in *Mat v Public Prosecutor*.

THE JURISPRUDENCE RELATING TO MAT v PUBLIC PROSECUTOR

[6] Before we deal with the facts and issues, we would like to point out that *Mat v Public Prosecutor* test is not a test per se within our contemporary jurisprudence in criminal law but a simplistic guide line to magistrates to explain how to convict or acquit an accused in relation to beyond reasonable doubt test at the end of the defence case. Subsequent to *Mat v Public Prosecutor* the law has developed in leap and bounds to give greater protection to the accused and a more onerous task to the prosecution to establish its case beyond reasonable doubt at the prosecution stage as well as the defence stage by introducing the maximum evaluation test as alluded in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 case and also an obligation to rebut the defence story if it has been placed at the earliest opportunity as alluded in *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209. And where the defence complains that the accused is innocent or innocent carrier the defence is required to place sufficient notice (*Alcontara* Notice) to the prosecution and where appropriate raise the statutory defence provided for the accused in s 53 of the Evidence Act 1950 as alluded in the recent Court of Appeal decision in *Rozmi bin Yusof v Public Prosecutor* [2013] 5 MLJ 66; [2013] 4 CLJ 384 to give probative force to the defence version. And finally the judge has to follow Radhi's direction in all aspect and deal with the prosecution case and its burden and contrast with the defence story however weak it may be and acquit the accused if a doubt arises in the mind of the judge notwithstanding in drug cases where defence is called to rebut trafficking and to do so the defence has to satisfy on the balance of probabilities as alluded by *Sochima*'s case. We will adumbrate on the cases and principles further as follows:

(a) at common law that too where trial was by jury it was well established that it was for the prosecution to prove the case beyond reasonable doubt at every stage of the proceedings to press for conviction. The locus classicus

case and the quote of Lord Sankey in *Woolmington v The Director of Public Prosecutions* [1935] AC 462 is well known in the common law jurisdiction. The said case as well as the common law position inclusive of other relevant cases to reflect the contemporary position to some extent has been adumbrated by Hamid Sultan Abu Backer JC (as he then was) in *Public Prosecutor v Mohd Aszzid Abdullah* [2008] 1 MLJ 281, and we do not wish to repeat save to reproduce that part in relation to *Woolmington* case which reads as follows:

> [14] In *Woolmington v Deputy Public Prosecutor* [1935] AC 462, the facts were that Woolmington was charged with murder. The trial judge directed the jury that once the prosecution had proved the killing, they should presume it to be murder unless the defendant proved facts justifying a verdict of manslaughter or an acquittal on the ground of accident. The defendant appealed to the House of Lords arguing misdirection on the burden of proof. The appeal was successful and the conviction was quashed. It was decided that:
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> > In a trial for murder the Crown must prove death as the result of a voluntary act of the prisoner and malice of the prisoner. When evidence of death and malice has been given, the prisoner is entitled to show by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted.
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> Lord Sankey LC observed:
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> > If at any period of trial it was permissible for the judge to rule that the prosecution had established its case, and that the onus was shifted on the prisoner to prove that he was not guilty and that unless he discharged that onus the prosecution was entitled to succeed, it would be enabling the judge in such a case to say that the jury must in law find the prisoner guilty and so make the judge decide the case, and not the jury, which is not the Common Law. It would be an entirely different case from those exceptional instances of special verdicts where a judge asks the jury to find certain facts and directs them that on such facts the prosecution is entitled to succeed. Indeed, a consideration of such special verdicts shows that it is not till the end of the evidence that a verdict can properly be found and that at the end of the evidence it is not for the prisoner to establish his innocence but for the prosecution to establish his guilt. Just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner, which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt. But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to *raise a doubt* as to his guilt; he is not bound to satisfy the jury of his innocence …

> Throughout the web of the English criminal law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt … No matter what the charge matter what the or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. (Emphasis added.)

(b) the *Woolmington*'s case was distinguished by the Privy Council. In *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 (PC), the Privy Council in relation to the burden of proof as per the statute had this to say:

> Wolmington v Deputy Public Prosecutor is not in Their Lordships' view germane to the present appeal. It was concerned with an offence at common law, not with an offence as to which there is an express statutory provision altering the ordinary onus of proof which in a criminal case lies upon the prosecution and imposing upon the defendant the burden of proving the existence or non-existence of a particular fact by way of defence.

In essence, *Woolmington* test will not apply where there is an express statutory provision altering the ordinary onus of proof. That is to say at common law where Woolmington test applies the defence can practically rest with the laurels and wait for the prosecution to prove their case beyond reasonable doubt if the defence story is that the accused is innocent. However, the Malaysian position is not the same whether *Woolmington* test applies or not as the defence need to be proactive and place their defence at the earliest opportunity and give *Alcontara* Notice where applicable and put the defence case at the prosecution stage itself and where defence is called lead evidence at least through the accused to create some doubt in the mind of the judge relating to the prosecution case;

(c) in *Mat v Public Prosecutor* [1963] 1 MLJ 263 Suffian J (as His Lordship then was) gave some guidelines relating to *Woolmington* test to magistrates that too to deal with the burden at the end of the defence case. His Lordship's lucid guideline of *Woolmington* test reads as follows:

> The correct law for magistrates to apply is as follows. If you accept the explanation given by or on behalf of the accused, you must of course acquit. But this does not entitle you to convict if you do not believe that explanation, for he is still entitled to an acquittal if it raises in your mind a reasonable doubt as to his guilt, as the onus of proving his guilt lies throughout on the prosecution. If upon the whole evidence you are left in a real state of doubt, the prosecution has failed to satisfy the onus of proof which lies upon it.
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> The position may be conveniently stated as follows:-
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> (a) If you are satisfied beyond reasonable doubt as to the accused's guilt — Convict.

(b)	If you accept or believe the accused's explanation	Acquit.
(c)	If you do not accept or believe the accused's explanation	Do not convict but consider the next steps below.
(d)	If you do not accept or believe the accused's explanation and that explanation does not raise in your mind a reasonable doubt as to his guilt	Convict.
(e)	If you do not accept or believe the accused's explanation but nevertheless it raises in your mind a reasonable doubt as to his guilt	Acquit.

> Magistrates would assist the appellate court if they indicate in their grounds that they are aware of the tests laid down in steps (d) and (e) above.

It is pertinent to note that this guideline is no more comprehensive in view of *Alcontara* Notice (see also s 51A of the CPC Notice), and *Balachandran*'s case relating to maximum evaluation and *Radhi*'s direction which must be followed by magistrates or judges which taken as a whole gives greater protection to the accused. In essence, the guideline in *Mat v Public Prosecutor* has lost its useful purpose and the learned counsel's complaint that *Mat v Public Prosecutor* guidelines were not followed strictly by the learned judge only shows that development of law has not been fully appreciated in the right perspective. If at all there is a complaint it must be based on the fact that *Alcontara* Notice was not properly considered by the judge or maximum evaluation test was not adhered to by the judge or *Radhi*'s direction was not strictly followed by the judge or the statutory defence for innocent person under s 53 of the EA 1950 was not properly considered by the judge or combination of some or all. It is not sufficient for the grounds of memorandum of appeal to be in length but it must be in substance to demonstrate that it is not a safe decision to convict, (see *Public Prosecutor v Thenegaran a/l Murugan* [2013] 3 MLJ 328);

(d) the case of *Mat v Public Prosecutor* does not discuss maximum evaluation or '*Alcontra* Notice' etc. It is now trite that the judge must at the end of the prosecution case apply the maximum evaluation test (positive evaluation) before ruling that a prima facie case has been established by the prosecution to warrant the defence to be called. In *Public Prosecutor v Mohd Aszzid Abdullah* [2008] 1 MLJ 281 the court has summarised the maximum evaluation test as propounded by the Federal Court in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301. That part of the judgment reads as follows:

> [25] Now in *Balachandran*, the learned judge of the Federal Court has clearly set out the test for prima facie and I hereby summarise what was said for the benefit of the adjudicators in subordinate courts as follows:
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> (i) A prima facie case is established where there is sufficient evidence to

be called upon to answer and evidence adduced by the prosecution must be such that it can only be overthrown upon hearing evidence in rebuttal by the defence to the prosecution case.

(ii) The force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts that exist did not happen (see definition of 'facts', 'facts in issue' and 'proved' in s 3 of the EA 1950 — to be read with ss 101–103 of the EA 1950).

(iii) A prima facie case is not made out if there is no material evidence which can be believed in the sense as described earlier, (see definition of 'disproved' and 'not proved' in s 3 of the EA 1950).

(iv) To make a finding either way, the court must at the close of the prosecution case, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offences have been established.

(v) Once a prima facie case is established and the accused elects to remain silent, he must be convicted. The test at the close of the prosecution case would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no prima facie case.

(vi) As the accused can be convicted on the prima facie evidence, it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt.

Further, the learned judge of the Federal Court opined that:

> As the accused can be convicted on the prima facie evidence it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt. However it must be observed that it cannot, at that stage, be properly described as a case that has been proved beyond reasonable doubt. Proof beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt the other is the evidential burden on the accused to raise a reasonable doubt. Both these burdens can only fully discharged at the end of the whole case when the defence has closed its case. Therefore a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon a consideration of all the evidence adduced as provided by s 182A(1) of the Criminal Procedure Code. That would normally be the position where the accused has given evidence. However, where the accused remains silent there will be no necessity to re-evaluate the evidence in order to determine whether there is a reasonable doubt in the absence of any further evidence for such a consideration. The prima

facie evidence which was capable of supporting a conviction beyond reasonable doubt will constitute proof beyond reasonable doubt.

It follows that the submission of learned counsel that the burden on the prosecution at the close of its case is to make out a case which is beyond reasonable doubt and not on a prima facie basis is contrary to the clear and plain language of ss 180 and 182A. It cannot therefore be sustained.

(e) further at the prosecution stage or defence stage, before applying the maximum evaluation the trial judge has to consider the defence complaint or statement or version according to the stage of proceedings. In addition if '*Alcontara* Notice' has been given to the prosecution at the earliest opportunity then onus will be placed on the prosecution to disprove the accused version. In *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209, Edgar Joseph JR FCJ had this to say:

> To resume our discussion regarding the important point of misdirection as regard the burden of proof, especially the burden on the defence, we must point out, with respect, that it was wrong for the judge to have criticised the defence for having failed to put to the investigating officer, the name of Che Mat, or the latter's telephone number or his place of abode, for the simple reason that these particulars had been disclosed in the cautioned statement of the appellant made the day after his arrest so that the police had all the time in the world to check their veracity. That being the case, the onus was on the prosecution to check on whether the appellant's version of the facts, as they appeared in his cautioned statement and to which we have referred, was true or false. In other words, the onus was upon the prosecution to disprove this important part of the appellant's version of the facts. The defence were, therefore, under no duty to put the matters aforesaid to the investigating officer, having regard to their prior disclosure in the cautioned statement. In holding to the contrary, the judge had undoubtedly overlooked the material portions of the cautioned statement touching on Che Mat, reversed the onus, and placed it on the defence, so that on this further ground also, the conviction had to be quashed.

It is pertinent to note that the '*Alcontara* Notice' must have sufficient particulars in the right perspective and not a vague notice where the prosecution will not be able to advance their investigation to rebut the defence story or version. It must also be given at the earliest opportunity at the material time of the arrest or at least upon counsel taking instruction from the accused to conduct its defence. In addition the defence's version should be put at the prosecution stage and the story must be maintained at the defence stage. There will be a duty placed on the judge even at the prosecution stage to positively evaluate the story of the accused relating to '*Alcontara* Notice' before evaluating the prosecution case and applying the maximum evaluation as *Alcontara* case places the onus on the prosecution to rebut or sufficiently explain that

they have discharged that onus. In the instant case evidence will show that the defence has not given an '*Alcontara* Notice' in the right perspective; and

(f) the trial judge must strictly follow the *Radhi*'s direction both at the prosecution as well as the defence case. The distinction between the common law and the contemporary position relating to *Radhi*'s direction has been captured in *Public Prosecutor v Mohd Aszzid Abdullah* which reads as follows:

> [9] In Malaysia the two stages of the criminal proceedings is captured in s 173(f) of the CPC for trial before the subordinate courts and s 180 for trials before the High Court. There is a distinction in contrast with England. In England, the defence has an option to submit no case to answer, failing which the accused may give evidence or refuse to do so and it is for the jury to decide whether the prosecution has proven the case beyond reasonable doubt. The jury does not decide this issue at the prosecution stage. The fact that the jury only decides at the second stage and not the first stage is one important distinction. Under the CPC, there is a statutory duty for the prosecution to establish a prima facie case before the court is obliged to call for the defence. That is not the position in England. Thus, it will appear that there is a greater statutory protection given to the accused here, in contrast to England. The courts have on various occasions asserted that legal burden entrusted on the prosecution by statute at the first stage must be discharged according to the required standard of proof that being beyond reasonable doubt and nothing less (now it is subject to the test and caveat expounded by the Federal Court in *Balachandran*). In consequence, and because the position in England is not the same, there is a veritable explosion of cases in this area of law trying to explain the concept in various manner, which the prosecution in this case has attempted to highlight without giving any conclusive submission as to what is prima facie case, notwithstanding the clear guidance shown by Augustine Paul FCJ in the case of *Balachandran* and similar views were expressed by Gopal Sri Ram JCA in *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 and also whilst sitting in the Federal Court in the case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393 where the learned judge opined:
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> > For the guidance of the courts below, we summarise as follows the steps that should be taken by a trial court at the close of the prosecution's case:
> >
> > (i) the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;
> >
> > (ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is 'Yes',

then a prima facie case has been made out and the defence should be called. If the answer is 'No' then, a prima facie case has not been made out and the accused should be acquitted;

(iii) after the defence is called, the accused elects to remain silent, then convict;

(iv) after defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v Public Prosecutor* [1963] MLJ 263.

[7] As stated above over the years the courts have departed from the common law position and have placed greater onus on the prosecution to prove its case and placed only a very light threshold not even evidence or burden, to create a doubt in the judge's mind for warranting an acquittal. In *Sochima Okoye v Public Prosecutor* [1995] 1 MLJ 538, Gopal Sri Ram JCA (as he then was) has asserted that as long as the defence story is not *inherently incredible*, it must be considered by the judge and tested with the prosecution case and if it creates a doubt in the mind of the judge then the judge has no option but to acquit. (Emphasis added.) (See *Woolmington v The Director of Public Prosecutions* [1935] AC 462). Even if the story is hearsay the judge must consider and deliberate on the judgment without criticising the defence case as asserted in the case of *Alcontara*.

[8] In essence the hallmark of proper judicial assessment and consideration in any judgment in criminal case will be reflected where the judge has considered the defence story in the right perspective taking into consideration where applicable the cases which we have alluded to above inclusive of the *Alcontara* Notice and the statutory defence under s 53. This panel has dealt with all stated above in piece meal or composite basis in a number of judgments; to name a few are as follows: (a) *Munuswamy Sundar Raj v Public Prosecutor* [2013] 5 MLJ 48; [2013] 1 LNS 183; (b) *Zulkifli bin Md Rodzi v Public Prosecutor* [2013] 3 MLJ 745; [2013] 4 CLJ 250; (c) *Rozmi bin Yusof v Public Prosecutor* [2013] 5 MLJ 66; [2013] 4 CLJ 384; (d) *Tong Kam Yew & Anor v Public Prosecutor* [2013] 4 MLJ 888; [2013] 3 AMR 248 and needs no repetition.

THE BRIEF FACTS

[9] The appellant was arrested at Penang Bayan Lepas Airport with the bag containing the drugs. The drugs were recovered from the bag in the presence of the custom officers. As to the issue of knowledge, the appellant complaints that the learned judge has not given proper consideration not only to the issue but also other issues that were raised at the prosecution stage itself. The judgment of the learned trial judge from pp 21–27 deals with the relevant issues

complained of quite comprehensively and much judicial time will be saved if it is repeated in extenso. That part of the judgment reads as follows:

> The conduct of the accused in appearing restless and uttering 'Oh, my God!' and cried when the drugs were discovered and shown to her by PW7 shows that the accused knew about the drugs inside the bag.
>
> Any innocent person at this point when being confronted with such a serious accusation would have uttered like the accused but as a sane and reasonable person he or she would have gone a step further by protesting his or her innocence and giving an explanation on how he or she did not know at all about the presence of the drugs concealed inside the bag. This would inevitably entail on how he or she came to get hold of the bag and give details on the person who had access to the bag and might be the culprit who hid the drugs inside the bag or any point of time where someone unknown to her who might have the opportunity to do so. However the accused in this case did not attempt at all to give such an explanation and when the bag (P5) was further searched at the Customs Prevention Complex in Seberang Perai. Surely by this time whatever confusion that the accused had on her mind would by then tapered off and she would have regained her composure and be able to offer such an explanation.
>
> *Section 37(d) of the Dangerous Drugs Act 1952 (Act 234)*
>
> On the other hand the court finds that the accused had possession of P5 and the incriminating drugs by virtue of s 37(d) of Act 234. The accused had flown from Maputo in Mozambique to Johannesburg, South Africa and from Johannesburg to Hong Kong and from Hong Kong to Penang, Malaysia and the luggage tag (exh P17) attached to the maroon bag (P5) bears the reference numbers of the flights from Johannesburg to Hong Kong and to Malaysia as seen in the flight ticket. The accused's name is also found on P17.
>
> When the aircraft finally landed at the Penang Bayan Lepas International Airport, the accused eventually retrieved P5 and carried it to the scanning machine where the drugs were detected.
>
> The facts as narrated by the prosecution show that the accused had presumed possession of the bag and therefore the drugs hidden inside both side linings of the bag. By keeping the padlock keys to the padlock of P 5 in her handbag it means that the accused was having custody or control of the maroon bag and its contents including the drugs.

In *Chan Pean Leon v Public Prosecutor* [1956] 1 LNS 17 Thompson J held:

> 'Possession' itself as regards the criminal law is described as follown in *Stephen's Digest* (9th Ed), p 304):
>
> > A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.
> >
> > To put it otherwise, there is a physical element and a mental element which must both the present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for

example have it in his pocket or have it lying in front of him on a table. It must also be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some animus possidendi. *Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case.* If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on a table in a room in which I am but which is also frequently used by other people then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be shows such an intention. Or it must be clear that the circumstances in which it is found show such an intention. *It may be found in a locked room to which I hold the key* or it may be found in a drawer mixed up with my own belongings or it may be found, as occurred in a recent case, in a box under my bed. The possible circumstances cannot be set out exhaustively and it is impossible to lay down any general rule on the point. But there must be something in the evidence to satisfy the Court that the person *who is phsically in a position to deal with the thing as his own had the intention of doing so.*

Trafficking

The accused was seen by PW5 taking the incriminating maroon bag from the carousel and carrying it to the scanning machine with it. By virtue of s 2 of Act 234, the accused by 'carrying' the bag containing the hidden drugs was trafficking in dangerous drugs. See *Public Prosecutor v Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129 (FC) and *Teh Geok Hock v Public Prosecutor* [1989] 1 CLJ (Rep) 160 (SC). The amount of drugs being substantial was clearly not meant for personal consumption.

In *Public Prosecutor v Urn Hock Boon* [2009] 3 CLJ 471 (FC) per Abdul Aziz Mohamad FCJ of the Federal Court held:

> The passage from *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705 that the Court of Appeal relied on in the present case does not, to my understanding, lay down the principle, to quote the Court of Appeal again, 'that once the prosecution elects to rely on one of the statutory presumptions in s 37 of the Act, it cannot at a later stage of the trial seek to rely on the very general definition of s 2 of the Act.'

Power of disposal

The accused had the padlock keys to the padlock locking the maroon bag and thus P5 was under her control and she was alone at the material time. The accused knew the presence of the drugs and the bag (P5) belongs to her, thus she also had the power of disposal over the drugs concealed inside it.

See *Public Prosecutor v Salleh Zakaria & Anor* [2010] 4 CLJ 671 (CA) on the meaning of the 'power of disposal'.

Credibility of the Witnesses

The court finds no reason to doubt the credibility of all the prosecution witnesses. They had no axe to grind against the accused as they do not know her at all and were just carrying out their routine duties when they stumbled on the hidden drugs. In fact the discovery of the drugs was not even based on information received.

Cautioned Statement (D25)

The learned defence counsel tendered the purported cautioned statement (D25) of the accused during his submission which appeared that earlier on he had forgotten to tender through the investigating office PW10. After reading through the contents and finding that no prejudice would be caused to the prosecution the court allowed it to be admissible as defence exhibit. In *Public Prosecutor v Lin Lian Chen* [1992] 4 CLJ 2086, the Supreme Court held that an accused had the right to introduce his cautioned statement during the case for the prosecution.

Nonetheless as the contents of D25 had not been tested through cross examination, the court does not give much probative value to it.

D25 given by the accused telling that her purpose in coming to Malaysia was to see her boyfriend 'Mike' in Kuala Lumpur. She also said that George the brother of her boyfriend gave her the maroon bag in Mozambique as her bag which she was supposed to bring to Malaysia looked old. The telephone number of her boyfriend was also recorded in her hand phone.

It is of significance to note that by tendering D25 at this stage the implication is which the Supreme Court in the cited *Lin Lian Chen* had observed:

> The reason for the decision was that the statement was that of the respondent (accused) who had personal knowledge of the facts stated therein and who had personal knowledge of the facts stated therein and who had authenticated it by signing it. In other words it was the respondent who was the author thereof and who had himself wished it to be admitted, it being acknowledged by him in the cautioned statement itself that it was made voluntarily after due administration of the statutory caution.

By tendering the supposed cautioned statement of the accused, it can be likened to a two-edged sword which also cut back the accused especially when some parts of the statement are favourable to the prosecution.

Here as the statement was made of the free accord of the accused, the element of knowledge, one of the ingredients vital for the offence may also be detected from its contents.

In Question 20 it was asked (taken in verbatim):

> Do you check the bag (meaning the maroon bag) he give you?

The accused answered (taken in verbatim):

I just open the bag and look inside and parking (meaning 'packing') my thing in to the bag.

Therefore when the accused was packing her personal belongings inside the bag as the hidden packets of drugs concealed inside both sides of the bag were not soft but hard and thick she ought to have felt them with her hands and ought to have known of their presence. Even assuming for a moment that at that time she did not know the exact nature of the contents of the packages, surely any reasonable person would have pursued the matter and enquired about their contents and in this case she claimed that George gave the bag to her, she should have asked George about the contents of the packages. By doing so, she would have known of the drugs. Finding out is important as she would be bringing the bag to faraway Malaysia as anything illegal would have put her into trouble. Self preservation is nature first law of instinct.

Chemist Evidence

The chemist PW6 had testified that the weight of the methamphetamine seized from the accused has exceeded the statutory limit imposed by the Dangerous Drugs Act 1952 after he had carried out the analysis.

In reply to the argument of the defence, there is no requirement of law in the Dangerous Drugs Act 1952 (Act 234) that the chemist must take at least 10% of the total weight of the drug for analysis as decided by the case of *Gunalan Ramachandran & Ors v Public Prosecutor* [2004] 4 CLJ 553 (CA) where Abdul Hamid Mohamad JCA (as he then was) viewed that the taking of the 10% sample is a only a practice among the chemists.

In both the Supreme Court cases of *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 and *Public Prosecutor v Lam San* [1991] 3 MLJ 426, they held that the evidence of the chemist is only confined to the elementary nature and identity of the substance, thus the court is entitled to accept the evidence at face value unless it is inherently incredible or the defence calls another chemist to contradict the opinion.

The case of *Public Prosecutor v Loo Kia Meng* cited by the defence that a minimum of 10% of the drug must be taken for analysis had been held by the Federal Court case in *Chu Tak Fai* [2006] 4 CLJ 933 that it should not be followed.

Credibility of PW7

There is no law to say that a witness cannot refresh his memory by looking at the exhibits already tendered and displayed in the open court when the court is not in session. The court finds that looking at the overall evidence given by PW7, his credibility is not in doubt.

Fingerprint Dusting

The absence of finger prints of the accused on the drug exhibits does not affect the prosecution case as the court has found that it had proved possession of the drugs against the accused.

For the reasons aforesaid, the court finds that the prosecution had proved a prima facie case against the accused and called for her defence.

After the three alternatives were explained to her in the presence of the defence counsel, the accused elected to give her evidence from the witness box.

[10] In addition the learned trial judge has taken the pain to assess the defence story in meticulous detail and it is found in pp 27–39. The analysis of the accused story reads as follows:

> The court believes that 'George' exists based on the evidence given by the accused but whether George did give the accused the incriminating maroon bag (exh P5) at the airport in Maputo, Mozambique is another issue.
>
> The court finds that George the brother of the purported boyfriend called 'Mike' of the accused who according to the accused sent her to the Maputo Airport in Mozambique as claimed by the accused even assuming if true, did not give her the new bag (P5) at the airport.
>
> George had commented that the bag that the accused was supposed to bring over to Malaysia was *too old* and *torn* and that he had wanted to replace it with a new bag in his car. The story is not logical because in the first place when George went to her residence to fetch the accused to the airport, surely at one point in time or another he ought to have seen the bag that the accused was bringing along whether in her residence or when she was carrying it into his car.
>
> There and then on seeing the sorry state of her bag as claimed when George already had the new bag in his car, he would have instantly asked the accused to change her bag. To change the bag at her home would be more pragmatic, bearing in mind that the accused needed to repack her personal belongings into the bag. To change the bag at the eleventh hour which entailed repacking of the personal belongings of the accused when she was about to scan her bag at the airport would have wasted precious time and not practical.
>
> The story is also not convincing as the accused was going to embark on a long haul flight to Malaysia which is far away from Mozambique or Zambia and thus no ordinary and sane person would have packed his or her personal belongings into such a bag which common sense dictates might not be 'structurally' strong enough to contain all her things including clothes. A seasoned traveller like the accused who had been to Pakistan, Nairobi, Zimbabwe Mozambique and Malaysia would have definitely known that luggage are sometimes being handled roughly when they are loaded onto the aircraft and being unloaded besides having heavier luggage stacked on top of one another. In such a situation, the old and torn bag would probably be more torn and not be able to hold all her things.
>
> To buy a new travelling bag would have not cost a fortune and the accused had with her US$1,100 when she was arrested in Penang.
>
> Material Contradictions
>
> In her cautioned statement (D25) which the accused tendered as her defence exhibit of her own accord, the accused did not state that George gave her the bag at the airport in Maputo, what is more, the accused said in D25 that after George had given the bag to her, she just opened the bag and looked inside *and packed her things*

into the bag. In her testimony in court, the accused said that George repacked her personal belongings into the new bag and gave it to her at the airport.

In reality, the court views that no such bag was given to her by George.

Moreover the accused gave evidence that George gave her the three padlock keys but in D25, she did not mention this fact at all. The failure to do so goes to her credibility.

Mike

The court opines that 'Mike' the man who is supposed to be the boyfriend of the accused and whom the accused flew here to meet up with him does not exist. The accused had testified that she had known Mike, a Nigerian *for more than three years* yet apart from saying that his hand phone number had been recorded in her hand phone, she could not give any more details. She said that Mike is a student in Kuala Lumpur however the accused could not even tell what course was 'Mike' studying and in which college in Kuala Lumpur.

At least she could have given details of Mike's background in Nigeria like his home address, his siblings and parents and his close friends yet none of such details were forthcoming.

Knowledge

By packing her personal belongings into the bag (P25) in all likelihood the accused would have felt the two plastic packages of drugs C(1)(a)37, P9B1 and C(1)(a)38, P9B2 being hidden inside the two sides on the bag as the packages were not flat but thick and bulging.

After feeling their presence, any reasonable person would have taken steps to find out the nature of the things being hidden.

Drugs Planted

The defence learned counsel not only submitted that the maroon bag did not belong to the accused *contrary to the evidence of the accused herself who said that the bag is her bag* but he also alleged that the drugs were planted and concealed inside the bag.

This allegation gives rise to the question that who would be the person with motive to frame up the accused. The accused did not lead any evidence to say that she believes somebody she knows harbours such an intention.

Uttering 'Oh, my God!'

The accused claimed that after the drugs were being discovered, a male officer carrying a pair of handcuff came to her and told her 'I am going to arrest you for carrying drugs' and in the midst of saying those words, he began to handcuff the accused making the accused blurted 'Oh, my God!' and to cry.

The court finds the version of the prosecution more reasonable that upon the discovery of the drugs and being shown to the accused, she uttered 'Oh, my God!' and began to cry.

The court finds that the accused carried the maroon bag and knew of the presence of the drugs hidden inside the bag. When being confronted at the Penang Bayan Lepas International Airport upon the discovery of the drugs concealed inside P5,

never at one moment did the accused did tell the customs officers that it was George who gave her the bag. Therefore the inference for the court to draw is that the evidence that George gave her the bag containing the drugs is not true and an afterthought.

Therefore for the reasons stated here, the court finds that the accused had not cast a reasonable doubt on the prosecution case and the prosecution had proved its case beyond reasonable doubt against the accused.

The court finds the accused guilty of the charge against her and convicted her of the offence as stated in it. The court then imposed the mandatory death sentence on her.

[11] Even though learned counsel for the appellant relied on only issue relating to 'knowledge', we have taken the liberty to go through each and every ground raised in the petition. We find no merits in the appeal.

[12] It is well settled that it is in the hands of triers of facts to assess the quality of evidence and to determine whether the evidence on record justifies a conviction as well as sentence. We have perused the evidence in detail and we are satisfied that there is sufficient material to support a charge for trafficking and the view taken by the trial court on the relevant issues in our view was a reasonable view of the evidence on record, and the court had followed *Radhi*'s direction and rightly applied the maximum evaluation and beyond reasonable test.

[13] In the instant case we are satisfied that the conviction is safe and the appeal must be dismissed.

[14] We hereby order so.

Appeal dismissed.

Reported by Afiq Mohamad Noor